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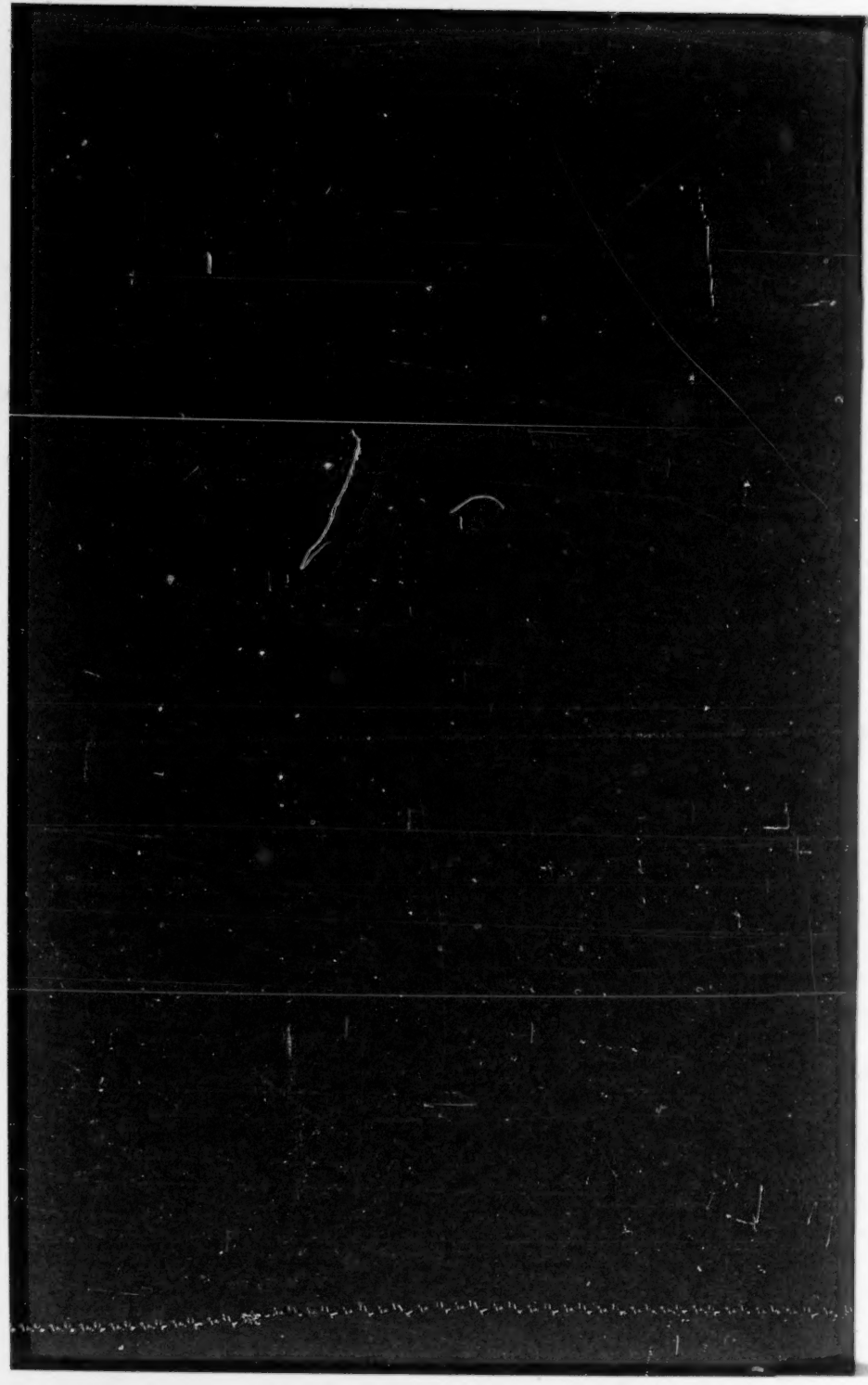

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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1279

WILLIAMS & WILKINS CO., PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States Court of Claims (Pet. App.) is reported at 487 F. 2d 1345.

JURISDICTION

The judgment of the Court of Claims was entered on November 27, 1973. The petition for a writ of certiorari was filed on February 20, 1974, and was granted on May 28, 1974. The jurisdiction of this Court rests on 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether respondent's libraries, in furnishing single photocopies of technical journal articles to their patrons, made a fair use of petitioner's copyrighted journals, and thus did not infringe the copyrights.

STATEMENT

This is an action for copyright infringement brought by petitioner in the Court of Claims under 28 U.S.C. 1498(b). The petitioner is a publisher of medical journals; the respondent is the United States, acting through the Department of Health, Education, and Welfare, and, more particularly, the National Institutes of Health (NIH) and the National Library of Medicine (NLM).

The specific conduct of respondent alleged by petitioner to be copyright infringement is the practice of the libraries at NIH and NLM of furnishing to their users, upon written request, a single photocopy of a journal article. In the case of the NIH library, the users are employees of NIH.[1] NLM is a library's library—its users are other libraries. These user libraries ultimately forward the photocopies provided by NLM to the physicians and medical researchers who have requested them.

It is conceded that defendants made at least one photocopy of each of eight specified articles in four of petitioner's journals (*Medicine, Pharmacological Reviews, Journal of Immunology* and *Gastroenterology*).[2] These articles reported on work conducted by the authors—half of the articles noted that the work

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[1] Although the NIH library is open to the public, the photocopying service is available only to NIH employees (Pet. App. 80).

[2] The articles involved are identified at Pet. App. 72, and the dates of the photocopies and the requesters are given at Pet. App. 75.

was supported by NIH grants (Pet. App. 89).[3] Petitioner does not pay the authors of articles published in its medical journals (Pet. App. 77).[4] Three of the four journals in which the articles appeared are published by petitioner for the benefit of certain professional societies, which employ editorial boards to select and edit the articles. The society and petitioner share the profits of each of these magazines (Pet. App. 73, 77).[5]

Petitioner does not maintain a stock of reprints or back issues; when an article is published, the petitioner sells the author a number of reprints; the author customarily distributes them free on request while they last (Pet. App. 19, 78). Petitioner refers requests for articles which have appeared in its journals to the author; if the author cannot provide a reprint, petitioner will offer to sell a back copy if one is in stock, or will refer the requester to a licensed reprint house for a copy of the journal. As a last resort, petitioner refers requests to its licensee for making photocopies (Pet. App. 78).

The functions of NIH include the promotion of medical research and the improvement of biomedical communications. The research function of NIH is car-

[3] The federal government supported approximately two-thirds of all medical research in the country in 1970 (Pet. App. 79). Since 1965, the government has, as a condition of its grants, retained the right to photocopy any resulting publications (Pet. App. 90).

[4] Indeed, it is customary for authors to pay publishers of such journals "page charges" for publication of their works (Pet. App. 77). The author of one of the articles at issue paid petitioner $800, provided by an NIH grant, to include special photographs in his article (Tr. 668).

[5] Petitioner publishes *Medicine* for its own benefit, compensating the editor with a share in the profits (Pet. App. 73).

ried on either by its own employees or through grants. More than 12,000 employees work for various specialized institutes on the campus at Bethesda, Maryland; 2,000 have doctoral degrees (Pet. App. 78–79).[6]

The NIH library contains between 95,000 and 120,000 volumes of journals. It subscribes to more than 3,000 different journals, including all those published by petitioner (Pet. App. 79).[7] These subscriptions cost the library $85,000 in 1970.[8] In that year, the library filled 85,744 requests from employees for photocopies of individual articles from the journals in its collection, constituting about 930,000 pages, at an average cost to the government of about $1 per request (Pet. App. 80).

NLM was created in 1956 for the express purpose of disseminating medical information.[9] It maintains one of the world's largest collections of medical literature (Pet. App. 5, 83).[10] Its collection of medical ma-

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[6] The research conducted by NIH employees results in the publication of more than 2,000 technical and scientific journal articles each year (Tr. 229).

[7] Six hundred of these journals, including the four involved in this suit, are purchased in multiple copies (Pet. App. 79). One of the two copies of each of these four journals stays in the library for consultation there, the other circulates (Pet. App. 80).

[8] This figure has been increasing steadily and rapidly. For example, in 1964, only $38,000 was spent for such subscriptions (Tr. 594).

[9] 42 U.S.C. 275, 276. Among the purposes of the library is to: "make available, through loans, photographic or other copying procedures or otherwise, * * * materials in the Library * * *" (42 U.S.C. 276(a)(4)).

[10] The collection includes more than 400,000 volumes of medical journals.

terial is available without charge to physicians and other scientists all over the world through interlibrary loans of journal material and through direct loans of books (Pet. App. 84).[11] In addition, NLM publishes the *Index Medicus,* which abstracts the world's medical literature,[12] and a catalog which announces NLM acquisitions. NLM provides special bibliographic services, and conducts research into improved methods of library science and communication of medical information (Pet. App. 83–84; Tr. 452, 457).

NLM currently subscribes to more than 18,000 journals (Tr. 746), including all but one of the journals petitioner publishes.[13]

The library's budget for journal subscriptions in 1970 was $189,131; in that year, it filled 93,746 interlibrary loan requests by photocopying a journal article (Pet. App. 88).[14]

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[11] Journal materials are ordinarily supplied by photocopies of the requested article, but articles from generally available current periodicals are not provided (see *infra*, p. 6).

[12] Users of *Index Medicus* are advised that access to articles cited can be obtained first through reprints from the author or publisher, second, from medical libraries at local schools, hospitals, and medical societies, third, from special libraries maintained by professional associations, fourth, from regional medical libraries, and, as a last resort, from NLM through interlibrary loan.

[13] Four copies of each of the four journals involved in this suit are received by NLM (Tr. 746).

[14] NLM is a regional library, serving the mid-Atlantic region. The number of interlibrary loan requests has been decreasing since 1966, as other regional libraries began filling requests from their regions. Thus, although about 120,000 requests were filled in 1968, the number then fell steadily to the 1970 figure (Pet. App. 84, 85, 88–89).

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The photocopy operations of the NIH library and NLM are conducted on similar basic principles. Each library has a policy designed both to prevent abuse of the library's facilities, and to protect the legitimate interests of copyright holders. Thus, NIH and NLM impose several restrictions in providing photocopies: (1) a written request must be submitted for each article, (2) only a single copy is furnished, (3) only a limited number of pages is furnished, ordinarily not more than 40 or 50, and (4) excessive copying from a single issue or a single volume of the journal is not permitted (Pet. App. 80–81, 84–85).[15]

In addition, in neither program is the primary effect the further dissemination of articles in current, generally available publications. The median age of articles from petitioner's journals photocopied by NIH is three years (Pl. Exh. 12, Tr. 158). NLM will not supply articles in generally available journals published within the preceding five years, except to government libraries (Pet. App. 85).

The policies governing the photocopy operations of both the NIH library and the NLM are derived in part from the General Interlibrary Loan Code (Pet. App. 87; Tr. 625, 839).[16] This Code, to which libraries

[15] The court found that these limitations were consistently imposed by the libraries, and that there was no evidence that they were evaded by the libraries' users (Pet. App. 15, 81, 85–86).

[16] Other government libraries have adopted similar policies (Pet. App. 103). Except in cases where the copyright holder has explicitly refused permission to copy any materials, Library of Congress procedures currently permit photocopying for research of non-current copyrighted technical journals in the library's collections in lieu of loaning the material. Ma-

generally subscribe, provides that libraries may fill requests for the loan of journal materials by providing photocopies (Pet. App. 87–88). The General Interlibrary Loan Code dates from 1952; its provisions are based on the 1935 "Gentlemen's Agreement," a series of letters between representatives of publishers and libraries in which library photocopying was recognized as a legitimate method of filling requests for the loan of journal materials (Pet. App. 95–97; Tr. 840). Photocopying by libraries has been an established practice for at least 50 years (Pet. App. 97–98).

The Court of Claims, three judges dissenting, concluded that the NIH and NLM photocopying programs constituted a fair use of copyrighted materials. In reaching this conclusion, it rejected the contrary recommendation of the Trial Judge, and found it unnecessary to pass on the government's contention that the authors of the articles, not petitioner, were the owners of the articles (Pet. App. 7).

The Court of Claims emphasized that its conclusion was based on the presence in this case of eight elements.[17] It noted that "probably the core of our

chines for photocopying provided to readers at the Library of Congress bear the notice that a single copy of copyrighted material may be made for purposes of research and study (Pet. App 17, note 16).

[17] "We do not have to, and do not, say that any particular component would be enough, either by itself or together with some of the others. Conversely, we do not have to, and do not, say that all the elements we mention are essential to a finding of 'fair use'. They all happen to be present here, and it is enough for this case to rule, as we do, that at least when all co-exist in combination a 'fair use' is made out" (Pet. App. 28).

evaluation" consisted of three propositions: (1) that plaintiff had not shown it was substantially harmed by the NIH and NLM practices; (2) that the court was convinced medicine and medical research would be harmed by a finding that these practices constituted infringement; and (3) that, absent legislative guidance, the court should not impose such a risk of harm on these fields (Pet. App. 14, 19–25).[18]

SUMMARY OF ARGUMENT

Although the Copyright Act grants an exclusive right to "print, reprint, publish, copy, and vend" a copyrighted work, that right is limited by the equitable doctrine of fair use. The doctrine is designed to permit reasonable use of copyrighted materials without the owner's consent, in order to further the primary purpose of the Copyright Act: the promotion of the development of science, art, and industry.

[18] The other elements identified by the court as indicating that the photocopying here challenged constituted a fair use of the materials were: (1) The total absence of any element of commercial gain to be derived from the reproduction, since these libraries are non-profit institutions, and the major users of the service are scientific researchers and practitioners who need the scientific materials involved for their work, and will not reduplicate them for sale or general distribution (Pet. App. 14–15); (2) Both libraries have reasonably strict limitations on the photocopying services provided, which effectively minimize potential harm to the copyright owner (Pet. App. 15–17); (3) The practice of library photocopying has long been accepted as appropriate (Pet. App. 17–19); (4) There is grave uncertainty that the prohibition on copying in the current copyright law extends to this practice, and the House Report on the proposed revision of that law indicates that library photocopying is a fair use in appropriate circumstances (Pet. App. 8–11, 23–27); and (5) The practice in foreign countries indicates that the library photocopying here is a fair use (Pet. App. 27–28).

In the usual case in which the fair use doctrine is involved, a portion of a copyrighted work is incorporated into a subsequent publication or performance of the work for profit. Here, in contrast, the copying is done to make the material available for personal non-commercial use in scientific research. The limited kind of copying here involved constitutes fair use.

The courts generally consider four factors in determining whether a particular use of copyrighted material is fair: (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the extent of the copying involved; and (4) the economic effect of the copying on the copyright owner. Judged by these standards, the NIH and NLM photocopying at issue here was a fair use, and thus did not infringe the copyrights on petitioner's journals.

1. First, the purpose of the photocopying was solely to promote scientific progress. Neither the library nor the requesting scientist was attempting to benefit financially from the work of another. Instead, the aim of both was to facilitate access to information necessary for further research or better medical treatment.

2. The nature of the copyrighted work also supports the conclusion that the use here was fair. The copyrighted works were scientific and technical in nature and the copying was solely to advance these purposes. On the theory that the authors of such works intend that they are to be used by others in further research, reproduction for such use is generally considered fair.

There is more than an assumption of such an intention on the part of the authors of the works here

involved. Several of them testified that they favored respondent's photocopying practices, since they believed they were essential to effective research. Petitioner's willingness to license the photocopying of its journals does not justify ignoring the importance of that conclusion, nor does the decision below hamper the negotiation of voluntary licensing agreements between publishers and libraries. Indeed, the negotiation of such agreements is encouraged by the narrow decision below, since neither party to the negotiation can be sure of success in future cases with dissimilar facts.

3. Although entire copyrighted articles were reproduced, under the particular circumstances of this case the third factor, the substantiality of the material copied, does not require the rejection of the fair use defense. The amount of copying in relation to the total library holdings is minimal. It has never been held that the copying of an entire work is enough to make the defense of fair use unavailable. Instead, both accepted practices and analogous statutes indicate that copying of complete copyrighted works for personal use is accepted as a fair use. Moreover, the legislative history of proposed revisions of the Copyright Act reflects congressional understanding that the photocopying of entire copyrighted journal articles may be a fair use under existing law.

It is not significant that the library, rather than the researcher, performs the photocopying. So long as the library acts at his specific request to produce a single copy for his individual non-commercial use, the situation is functionally equivalent to the loan of

the original to the borrower and his reproduction of it.

4. Finally, the absence of economic damage to petitioner supports the conclusion that the photocopying here was a fair use. The demand for subscriptions to petitioner's journals has not been reduced by the photocopying of specific articles by NIH and NLM. Neither library will photocopy entire journals, and neither provides the service primarily with respect to current journals. Both programs thus serve the library function of providing occasional access to a greater quantity of material than any individual could possibly purchase and retain individually, rather than the magazine publisher's function of providing a current review of material in an area of specialized interest. Although petitioner alleges that photocopying in general damages its market for reprints, back issues and licensed photocopies, the record shows that it has not attempted to exploit these potential markets itself.

ARGUMENT

THE NIH AND NLM PROGRAMS MAKE FAIR USE OF PETITIONER'S JOURNALS AND THUS DO NOT CONSTITUTE COPYRIGHT INFRINGEMENT

The restricted reproduction by NIH and NLM of certain scientific articles from petitioner's magazines for the individual use of scientists and physicians falls within the doctrine of "fair use." Hence, it did not infringe any copyrights. The reproductions involved here are a recognized form of library loan, which is always fair use, and this conclusion is rein-

forced by analysis of the doctrine of fair use and the criteria that control its application.

A. A "FAIR USE" OF COPYRIGHTED MATERIAL IS NOT AN INFRINGEMENT OF THE COPYRIGHT

Unlike most forms of property, copyrights, though created by statute, derive from a specific power accorded to Congress by the Constitution. That power, moreover, specifies the objective for which it is to be used, and that objective has been held to imply the limitation upon copyrights as private property embodied in the fair use doctrine. This much is traditional learning.

The Constitution provides that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries." Art. 1, Sec. 8, cl. 8. Under this grant of power, Congress has enacted both the patent [19] and copyright [20] statutes. The primary purpose of these statutes is to promote the public welfare; reward to the author or inventor is a secondary consideration. *Mazer* v. *Stein,* 347 U.S. 201; *United States* v. *Paramount Pictures,* 334 U.S. 131, 158.

The present Copyright Act, enacted in 1909, grants authors [21] certain exclusive rights [22] and provides rem-

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[19] 35 U.S.C. 1, *et seq.*

[20] 17 U.S.C. 1, *et seq.*

[21] The government contended below that the journal article authors are the owners of the articles here involved. Only the owner or author of an article may copyright it, 17 U.S.C. 9; the publisher's copyright on a periodical covers contributed articles therein only if the publisher owns them, *Morse* v. *Fields,* 127 F. Supp. 63 (S.D. N.Y.). There was no express

edies for infringement of these rights.[23] To ensure that enforcement of an author's exclusive rights does not subvert the constitutional purposes, however, the courts have evolved the doctrine of fair use. As stated in *Berlin* v. *E. C. Publications, Inc.*, 329 F. 2d 541, 543–544 (C.A. 2):

> In the words of Article 1, Section 8, of the Constitution, copyright protection is designed "To promote the Progress of Science and useful Arts," and the financial reward guaranteed to the copyright holder is but an incident of this general objective, rather than an end in itself.

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assignment to petitioner of the articles involved; it claimed the assignment resulted by implication from established custom. The record does not support this claim, and *Kinelow Publishing Co., Inc.* v. *Photography in Business, Inc.*, 270 F. Supp. 851 (S.D. N.Y.), suggests that no such custom exists. Because the Court of Claims found there was no infringement, it did not decide the ownership of the articles (Pet. App. 7). We assume, *arguendo*, in this brief that petitioner is the owner of the articles and thus the holder of the copyrights. If the Court concludes that the library practices here involved would constitute an infringement of a valid copyright, the case should be remanded to the Court of Claims for determination of the ownership of the articles.

[22] 17 U.S.C. 1. The briefs *amici curiae* of the Association of Research Libraries, *et al.* and the American Library Association argue that these exclusive rights do not include the right to prevent the making of single copies of printed material for personal use, and hence that, without regard to the doctrine of fair use, there was no copyright infringement here. See n. 26, *infra*. While we agree generally with this argument, we do not believe that it is necessary, in the context of this case, to decide this broader question involving the scope of the coverage of the Copyright Act, since, as the Court of Claims concluded, the photocopying at issue here was, in any event, not an infringing use.

[23] 17 U.S.C. 101; the remedies for infringement by the government are specified in 28 U.S.C. 1498(b).

> As a result, courts in passing upon particular claims of infringement must occasionally subordinate the copyright holder's interest in a maximum financial return to the greater public interest in the development of art, science and industry.

See also *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (C.A. 2), certiorari denied, 385 U.S. 1009; and *Time Inc.* v. *Bernard Geis Associates*, 293 F. Supp. 130 (S.D. N.Y.).

Thus, in order to further science and the useful arts, the doctrine recognizes the " 'privilege in others than the owner of a copyright to use the copyrighted material in a reasonable manner without his consent, notwithstanding the monopoly granted to the owner * * *' Ball, *Copyright and Literary Property*, 260 (1944)." *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra*, 366 F. 2d at 306.

The doctrine is applied as its rationale dictates in each case, and has no sharp edges. As a recent report on a bill proposing a revision of the copyrighted laws noted:

> The judicial doctrine of fair use [is] one of the most important and well-established limitations on the exclusive rights of copyright owners. * * *
>
> * * * * *
>
> Although the courts have considered and ruled upon the fair use doctrine over and over again, no real definition of the concept has ever emerged. Indeed, since the doctrine is an equitable rule of reason, no generally applicable definition is possible, and each case raising the

> question must be decided on its own facts. [H. Rep. No. 83, 90th Cong., 1st Sess., 29.]

The Court of Claims here proceeded in just that fashion, basing its conclusion of fair use upon the specific facts of this case and carefully refraining from announcing sweeping principles. The court emphasized that it was not making any determination that all photocopying by libraries or by the government was necessarily consistent with the copyright laws.[24] Instead, the court stated that its "holding is restricted to the type and context of use by NIH and NLM, as shown by this record. * * * [W]e do not pass on dissimilar systems or uses of copyrighted materials by other institutions or enterprises, or in other fields, or as applied to items other than journal articles, or with other significant variables" (Pet. App. 28–29).

B. THE GOVERNMENT'S LIMITED REPRODUCTION OF MEDICAL ARTICLES HERE WAS A FAIR USE

In the course of this traditionally case-by-case approach, the courts have developed criteria which guide them in applying the fair use concept; an examination both of the special facts of this case and of the accepted criteria shows that the doctrine applies here.

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[24] There is thus no inconsistency between this decision and the legislative history of 28 U.S.C. 1498(b) cited by petitioner (Br. 15). H. Rep. No. 624, 86th Cong., 1st Sess., 5, indicates only that photocopying by the government may in some circumstances constitute copyright infringement. In considering revisions of the Copyright Act, Congress has recognized that library photocopying can be a fair use. See Pet. App. 26–27; n. 53, *infra*.

1. The special facts of this case indicate that this use is fair

This case is very different from those in which the doctrine of fair use is ordinarily involved.[25] Here, there is no incorporation of a copyrighted work into a subsequent published (or publicly performed) work. In contrast, this case involves numerous instances of the single reproduction of a copyrighted work for the individual use of the requestor. We know of no decisions specifically considering whether such reproduction is a fair use; this may be because of a general assumption that it is.[26]

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[25] See, *e.g.*, *Loew's Inc.* v. *Columbia Broadcasting System, Inc.*, 131 F. Supp. 165 (S.D. Cal.), affirmed *sub nom. Benny* v. *Loew's Inc.*, 239 F. 2d 532 (C.A. 9), affirmed by an equally divided Court *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43; *Leon* v. *Pacific Telephone & Telegraph Co.*, 91 F. 2d 484 (C.A. 9); *Public Affairs Associates, Inc.* v. *Rickover*, 284 F. 2d 262 (C.A. D.C.), judgment vacated, 369 U.S. 111.

[26] The *amicus* briefs of the Association of Research Libraries and the American Library Association argue persuasively that the Copyright Act was never intended to cover the copying of printed works for private use (Research Libraries Brief, pp. 18–45; Library Association Brief, pp. 14–20).

This Court has implied it shares this view. See *Goldstein* v. *California*, 412 U.S. 546, 555:

> To accomplish its purpose, Congress may grant to authors the exclusive right to the fruits of their respective works. An author who possesses an unlimited copyright may preclude others from copying his creation *for commercial purposes* without permission. In other words, to encourage people to devote themselves to intellectual and artistic creation, Congress may guarantee to authors and inventors a reward in the form of control over the *sale or commercial use of copies of their works*. [Emphasis supplied.]

Prior to the 1909 Copyright Act, the exclusive rights granted to the author of a published work did not include the right to copy

The Court of Claims noted several examples of copying for personal use or exchange on a purely non-commercial basis which are generally recognized as non-infringing, including the exchange of copies of poems or newspaper items between friends, or the exchange of law review articles and recent decisions, complete with the publishing company's headnotes, between lawyers and judges in litigation and adjudication (Pet. App. 13). Moreover, the provision by libraries of photocopying machines for the use of their patrons is commonplace, and the practice of providing photocopies to library patrons dates from at

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the work. *Harper* v. *Shoppell*, 26 Fed. 519 (C. Ct., S.D. N.Y.). The 1909 Act reorganized the provisions of the prior law, but was not intended to expand its coverage (H. Rep. No. 2222, 60th Cong., 2d Sess., 4).

It was assumed, both before and after the enactment of the Copyright Act of 1909, that the exclusive rights of the copyright owner did not include the right to control the copying of the copyrighted material for personal use (Research Libraries Brief, *supra*, pp. 34–39). Although advancing technology has rendered it far easier to make copies of published materials, that does not justify expanding the statutory copyright protection to a situation it was never intended to cover; the legitimate users of copyrighted materials, no less than their producers, are entitled to benefit from advancing technology.

There is thus at least "a solid doubt whether and how far" the Copyright Act prohibits the copying of books and articles (Pet. App. 9). We do not, however, believe that the Court need decide, on the facts of this case, whether the Copyright Act protects copyright owners against photocopying in some circumstances. (In a case in which, for example, photocopying was the functional equivalent of publication, presumably there would be copyright infringement.) But the copying of material for private use may well be outside the scope of the Copyright Act *ab initio;* at least, the fact that the copy is made for personal use and not for commercial benefit is strong support for the conclusion that it is a non-infringing fair use.

least 1935, when the so-called "Gentlemen's Agreement"[27] explicitly recognized that provision of single copies for research is a fair use. The Agreement notes that:

> The statutes make no specific provision for a right of a research worker to make copies by hand or by typescript for his research notes, but a student has always been free to "copy" by hand; and mechanical reproductions from copyright material are presumably intended to take the place of hand transcriptions, and to be governed by the same principles governing hand transcription [Pet. App. 97].

Therefore, the agreement provided that:

> A library * * * owning books or periodical volumes in which copyright still subsists may make and deliver a single photographic reproduction * * * of a part thereof to a scholar representing in writing that he desires such reproduction in lieu of loan of such publication or in place of manual transcription and solely for the purposes of research * * * [Pet. App. 96].

Congress has also recognized that the reproduction of copyrighted works for personal non-commercial use is not a violation of the Copyright Act. In the Sound Recording Act of 1971, Pub. L. 92–140, 85 Stat. 391, Congress amended the Copyright Act to protect against unauthorized duplication of sound recordings. It recognized the widespread practice of the making of private recordings from copyrighted ones, and stated that it did not intend to limit the making of such recordings. The precise reason given for this decision was "the

[27] The "Gentlemen's Agreement" was signed by the Chairman of the Joint Committee on Materials for Research and the President of the National Association of Book Publishers (Pet. App. 96–97).

intention of the committee that this limited copyright not grant any broader rights than are accorded to other copyright proprietors under the existing title 17." H. Rep. No. 487, 92d Cong., 1st Sess., 7.[28]

The private duplication of sound recordings, which Congress recognized to be a fair use, may well result in reducing the market for the copyrighted material. In addition, the purpose of most such private recording is purely for personal pleasure. *A fortiori*, the duplication by a researcher of a journal article for purposes of scientific study is a fair use.[29]

This conclusion is further supported by the discussion in the Judiciary Committee Report of the fair use provisions in the 1967 proposed revision of the Copyright Act. After emphasizing that these provisions were designed to reflect the existing law (H. Rep. No. 83, 90th Cong., 1st Sess., 31), the Report expressly recognized the propriety of reproducing a whole copyrighted article for classroom use (*id.* at 34–35):

> *Single copies of "entire" works.* In the various discussions of educational copying at the hearings and thereafter, a question that has never

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[28] Thus, the result in *Wihtol* v. *Crow*, 309 F. 2d 777 (C.A. 8), upon which petitioner relies, would presumably have been different if the copyrighted composition had simply been copied, and not arranged and performed publicly.

[29] A further indication that the private use of a single copy of a copyrighted work is a fair use is that 17 U.S.C. 107, which prohibits importation of unauthorized copies of books during the existence of the American copyright in such a book, nonetheless allows importation of single copies of such works "[w]hen imported, not more than one copy at one time, for individual use and not for sale * * *." 17 U.S.C. 107(d).

> been resolved involves the difference between an "entire work" and an "excerpt." The educators have sought a limited right for a teacher to make a single copy of an "entire" work for classroom purposes. The committee understands that this was not generally intended to extend beyond a "separately cognizable" or "self-contained" portion (for example, a single poem, story, or article) in a collective work, and that no privilege is sought to reproduce an entire collective work (for example, an encyclopedia volume, a periodical issue) or a sizable integrated work published as an entity (a novel, treatise, monograph, and so forth). With this limitation, and subject to the other relevant criteria, the requested privilege of making a single copy appears appropriately to be within the scope of fair use.

The Committee also indicated that this statement regarding fair use was generally applicable to all types of uses, stating (*id.* at 35):

> *Reproductions and uses for other purposes.*—The concentrated attention given the fair use provision in the context of classroom teaching activities should not obscure its application in other areas. The committee emphasizes again that the same general standards of fair use are applicable to all kinds of uses of copyrighted material, although the relative weight to be given them will differ from case to case.

The congressional understanding, as well as the longstanding library custom, is that the making of a single copy of an entire article for private use is a fair use, even if the copy is made purely for personal

pleasure.[30] The rule perforce applies to the making of copies of material borrowed from research libraries. If scholars are prohibited from copying copyrighted articles for their own use, either by hand directly by means of notes, or by photocopying, then the fundamental purpose of the research library is imperiled.

There is no reason why the result should be different if the library, rather than the researcher, operates the photocopying machine, or if the researcher is not physically present when the copy is made. So long as the copy is made at the specific request of the researcher, and for his own individual, non-commercial use, the practice is virtually identical with the loan of the material and its subsequent copying by the recipient. It is, in any event, far closer to that situation than to the one in which copyrighted material is incorporated into a competing work.[31]

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[30] "Anyone may copy copyrighted materials for purposes of private study and review." Cohen, "Fair Use in the Law of Copyright," *ASCAP, Copyright Law Symposium* (No. 6, 1955), 43, 58.

[31] Cf. *Fortnightly Corp.* v. *United Artists*, 392 U.S. 390, where this Court concluded that a CATV system does not infringe the copyright owner's exclusive right to perform his works. The Court noted that the CATV system simply enhanced the viewer's capacity to receive TV programs. The viewer himself could have similarly enhanced his capacity to receive TV programs by constructing a powerful antenna system himself, or jointly with other users. The fact that the CATV system was erected, owned, and operated by third parties did not affect its nature as part of the viewing, rather than the broadcasting function. *Id.* at 398–400. Similarly, here the libraries' photocopying is designed to facilitate the reader's ability to use the published journals, in substitution for copying by each reader individually. Functionally, it makes no more difference that the copying is not performed personally

2. The traditional factors indicate that the use is fair

Courts generally consider four factors in determining whether a particular use of copyrighted material is "fair": (1) the purpose of the use; (2) the nature of the copyrighted work; (3) the amount and substantiality of the material used in relation to the copyrighted work as a whole; and (4) the effect of the use on the copyright owner's potential market for his work.[32] These factors are guides to analysis, not absolute standards. Moreover, although the factors may be analytically isolated, the result turns on the total impact of all four criteria; "generally no single factor will determine whether a use is fair or unfair." A. Latman, Fair Use of Copyrighted Works, Copyright Law Revision Study No. 14, 86th Cong., 2d Sess., 13.

Each factor points to a conclusion of fair use here. That conclusion is further buttressed by the strong social policy which favors the finding of fair use in this case.

a. *The purpose of the use.* Here the sole objective of the use is the advancement of medical knowledge. The libraries involved are nonprofit institutions devoted entirely to furthering the progress of science in the field of medicine. The requesters are physicians

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by the ultimate beneficiary than it did that the viewer did not own the CATV system. Indeed, the case for non-infringement is even stronger here, since the CATV system is operated for profit whereas the libraries' photocopying is done to aid scientific research.

[32] Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law, Committee on the Judiciary, U.S. House of Representatives, 87th Cong., 1st Sess., p. 24.

who use the information contained in the articles for further research or for the treatment of patients, not for direct financial gain by resale or similar means. As the opinion of the court of claims indicates: "On both sides—library and requester—scientific progress, untainted by any commercial gain from the reproduction, is the hallmark of the whole enterprise of duplication. There has been no attempt to misappropriate the work of earlier scientific writers for forbidden ends, but rather an effort to gain easier access to the material for study and research" (Pet. App. 14–15).

b. *The nature of the copyrighted works.* The copyrighted works are purely scientific; the articles are written in order to disseminate specialized scientific information, not for commercial gain.[33]

Both the commentators and the courts have recognized that the case for fair use is strongest and most extensive where science and the arts are involved. Cohen, "Fair Use in the Law of Copyright," *ASCAP, Copyright Law Symposium* (No. 6, 1955), 43, 67; *Rosemont Enterprises, Inc.* v. *Random House, Inc., supra; Henry Holt & Co.* v. *Liggett & Myers Tobacco Co.*, 23 F. Supp. 302 (E.D. Pa.). Cf. *Loew's Inc.* v. *Columbia Broadcasting System, Inc., supra,* where the district court noted, in finding that Jack Benny's parody of "Gaslight" infringed the copyright (131 F. Supp. at 175):

> * * * the factor of use for commercial gain has been considered by the courts in connection with most, if not all, infringements of copy-

[33] See note 4, *supra.*

> righted material, regardless of the particular subdivision of Sec 1, Title 17 U.S.C.A., which is invoked. Thus, in the field of science and the fine arts, we find a broad scope given to fair use. "This doctrine permits a writer of scientific, legal, medical and similar books or articles of learning to use even the identical words of earlier books or writings dealing with the same subject matter." *Thompson* v. *Gernsback*, D.C. N.Y. 1950, 94 F. Supp, 453, 454. The writer of such works "invites reviews, comments and criticism" [citing Yankwich, *What is Fair Use*, 22 U. of Chic. L. Rev. 203 (1954)] and we could add, the *use* of the books and portions and quotations therefrom for the purpose of the advancement of learning. He does not invite or consent to its use for commercial gain alone.

A liberal application of the fair use doctrine is essential with respect to scientific works precisely because unless these works are disseminated, absorbed and commented upon, their purpose will not be served.[34] For this reason, the authors of the subject articles themselves favored the photocopying of their articles by respondent's libraries; they considered such photocopying essential to the efficient conduct of medical research (Pet. App. 23; Tr. 664, 669–671, 682, 713–715, 896, 901–902).[35]

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[34] The importance of the dissemination of these works is reflected in NLM's decision to provide, on request, photocopies of articles in recent journals which are not widely available.

[35] Moreover, the Governing Board of the American Gastroenterological Association and the Editorial Board of *Gastroenterology*, members of the association who select articles for the journal, "believe that the use of copyright as a basis for restriction of photocopying would impede the free flow of scien-

Petitioner disagrees. It contends that medical research will be better served by a holding that any library photocopying infringes the copyright, since it is willing to license the photocopying. It further contends that the decision below will make libraries unwilling to enter into voluntary agreements to recompense publishers for photocopying, and thus will injure medical research by rendering the publication of medical journals financially impossible (Pet. Br. 16, 27). But petitioner's willingness to license use of its journals cannot affect, because it begs, the legal question, which is whether a license is required. That question turns on whether the photocopying here involved is a fair use, considering, *inter alia,* its importance to medical research.[36]

Nor will the effect of the decision below be to discourage the negotiation of voluntary agreements.[37] By carefully circumscribing its decision, and warning that it was not reaching any conclusion concerning the propriety of other types of library photocopying, the court below encouraged the negotiation of voluntary licensing agreements between libraries

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tific information in our field, to which our Association is specifically dedicated." 64 *Gastroenterology* (1973), 1059.

[36] Petitioner's willingness is no assurance that the publishers of the thousands of other journals to which NIH and NLM subscribe will be of like mind.

[37] Indeed, there has been no such effect even upon the parties to the instant case. Since the initiation of this suit, petitioner has adopted the Court of Claims' suggestion (Pet. App. 25, n. 26) and now charges a higher institutional subscription rate to entities which engage regularly in photocopying. Both NIH and NLM currently pay this rate. 64 *Gastroenterology* (1973), 1059.

and publishers. Since the status of other photocopying programs remains unclear, both the libraries and the publishers can be expected to resolve their differences through negotiation, rather than running the risks of litigation.[38] The decision below thus is consistent with the congressional preference for voluntary licensing arrangements. See, *e.g.*, H. Rep. No. 83, *supra*, at 32–33.

The petitioner argues that libraries may continue to photocopy without licenses in the face of a holding that such copying constitutes infringement of the copyright, and rely on the courts to establish reasonable licensing fees in the guise of assessing damages for past infractions (Pet. Br. 29–30). Regardless of the validity of the assumption that libraries will knowingly violate the law, it is far from clear that the courts will adopt petitioner's view that they have the authority to establish a system of compulsory licensing of copyrights in the absence of any statutory recognition of such a system. A finding of such authority with regard to private libraries is particularly unlikely in the face of 17 U.S.C. 101, which contemplates that an injunction against further infringement is the appropriate remedy, and that continuous infringement after notice justifies the assessment of damages in

[38] For example, the library consortium described in petitioner's brief (pp. 19, 26–27), if it indeed were designed to reduce the number of journals purchased by the member libraries and instead to encourage them to exchange photocopies of complete current journals, would be a significantly different type of program from those of NIH and NLM. Therefore, the instant decision would not necessarily establish the validity of such program. See *infra*, n. 49

excess of the maximum otherwise permitted."[39] In sum, the court below correctly concluded that the fashioning of "intermediate solutions," such as compulsory licensing, involves the consideration of economic, social and policy factors more appropriate for legislative than for judicial consideration (Pet. App. 25).

c. The amount and substantiality of the material used. The amount of photocopying is not large in relation to the total size of the libraries. Although the NIH library contains an estimated 5 million journal articles,[40] only 85,744 requests for photocopies were filled in 1970, about 1.7 percent. The proportion of articles photocopied to total library holdings for NLM is even smaller—with a collection many times larger than that of NIH, only 93,746 articles were photocopied in 1970, much less than 1 percent of the total. Moreover, only a single copy of each article is furnished to a requester, excessive copying from a single journal is not permitted, and photocopying of current journals is limited.[41] Thus, the amount of photocopying done by both libraries is strictly limited, and is

[39] These provisions are in sharp contrast to 28 U.S.C. 1498 (b), which provides that the exclusive remedy for infringement by the government shall be an action for damages.

[40] This estimate is based on the assumption that each of the library's 95,000 to 120,000 journal volumes contains about 50 articles. See Adams, *Programs of the National Library of Medicine*, Seminar on Information Storage, Retrieval and Dissemination, New York, Nov. 5, 1964, p. 5.

[41] The median age of articles from petitioner's journals photocopied by NIH is 3 years (Pl. Ex. 12, Tr. 158), and NLM will not fill non-government requests for articles in generally available publications less than 5 years old (Pet. App. 85).

permitted only to the minimum extent consistent with the needs of the library patrons.

Petitioner places primary reliance, in arguing that the photocopying by NIH and NLM is not a fair use, on the fact that entire articles are copied; it argues that there can be no fair use in such circumstances. The Court of Claims properly found this contention "an overbroad generalization, unsupported by the decisions and rejected by years of accepted practice" (Pet. App. 13).

The decisions upon which petitioner relies arose in entirely different contexts, in which the user sought to invoke the fair use doctrine to justify a substantial reliance upon the copyrighted work in the production of a competing publication.[42] Moreover, in none of the cases did the court rely upon the fact that a whole work, rather than a portion of it, had been used.[43]

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[42] These cases would thus be relevant if the recipients of the library photocopies sought to incorporate them in substantial part into their own published articles.

[43] *Folsom* v. *Marsh*, 9 Fed. Cas. 342 (C. Ct., D. Mass.), is, as petitioner notes, one of the earliest recognitions of the doctrine of fair use, arising out of the use of certain letters or parts of letters of George Washington in defendant's biography of him. Mr. Justice Story emphasized that the question is whether the subsequent use of the material is a reasonable one, or whether the user has unfairly profited from the labors of another. The resolution of the question requires the consideration of several factors, including the "value of the materials taken, and the importance of it to the sale of the original work." *Id.* at 348.

In *Benny* v. *Loew's Inc.*, 239 F. 2d 532 (C.A. 9), affirmed by an equally divided Court *sub nom. Columbia Broadcasting System, Inc.* v. *Loew's Inc.*, 356 U.S. 43, the issue was whether a television parody of a work infringed the copyright. The court held that it did, noting that "substantial portions" of the work had been copied (239 F. 2d at 533).

The judgment in *Public Affairs Associates, Inc.* v. *Rickover*,

Similarly, cases in which the fair use defense is available have not distinguished between the use of a whole work or only a portion of it. See *New York Tribune, Inc.* v. *Otis & Co.*, 39 F. Supp. 67 (S.D. N.Y.); *Meeropol* v. *Nizer*, 361 F. Supp. 1063 (S.D. N.Y.).

Finally, it is particularly significant that the cases upon which petitioner relies involve the incorporation of a copyrighted work in a subsequent competing work, while this case involves only the reproduction of single copies for the requester's own use. For reasons stated above (*supra*, pp. 16–21), we believe that, whatever the rule may be in the former situation, the reproduction of entire works is a permissible fair use when single personal copies are involved.

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284 F. 2d 262 (C.A.D.C.), was vacated for an insufficient record by this Court, 369 U.S. 111. The value of the opinion as a precedent is therefore questionable. The case involved the attempt to publish a compilation of copyrighted speeches; the issue was the validity of the copyright. The publisher there sought to profit by the speechwriter's efforts. The district court on remand did not read the prior decisions in the case as indicating that the doctrine of fair use was unavailable because of the extensiveness of the quotations involved. Instead, it relied upon the fact that "there has been no clear showing of the use to which the quotations would be put." *Public Affairs Associates, Inc.* v. *Rickover*, 268 F. Supp. 444, 450 (D.D.C.).

In *Wihtol* v. *Crow*, 309 F. 2d 777 (C.A. 8), the unauthorized arrangement and performance of a copyrighted musical work was held to be an infringement of the copyright, since it unfairly appropriated the author's labors. The court did not place particular emphasis on the fact that the entire copyrighted work was used. Instead, it noted that "it is not conceivable to us that the copying of all, or substantially all, of a copyrighted song can be held to be a 'fair use' merely because the infringer had no intent to infringe." *Id.* at 780. 17 U.S.C. 1(b) specifically

d. *The effect of the use on the potential market for the articles.* Under the carefully limited NIH and NLM programs, the photocopying here has only a minimal effect on the market for the journals. Although there is no need to show actual damages if a copyright has been infringed, *F. W. Woolworth Co.* v. *Contemporary Arts, Inc.*, 344 U.S. 228, absence of economic injury from the use of a copyrighted work is a factor showing fair use.[44] The Court of Claims correctly found that the libraries' photocopying had not damaged petitioner's business.[45]

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reserves to the copyright holder the exclusive right "to arrange or adapt * * * [his copyrighted] musical work * * *."

Finally, in *Rosemont Enterprises, Inc.* v. *Random House, Inc.*, 366 F. 2d 303 (C.A. 2), the court held that the district court should not have granted a preliminary injunction against the use of material from copyrighted magazine articles in a subsequent biography of Howard Hughes, because, *inter alia*, of the potential availability of the defense of fair use.

[44] Nimmer, *Copyright* (1973), § 145; Report of Register of Copyrights, *supra*, p. 25; *Hill* v. *Whalen & Martell, Inc.*, 220 Fed. 359 (S.D. N.Y.).

[45] Subscriptions to petitioner's publications since 1959—when the advent of the xerox machine signaled the start of extensive photocopying—have increased substantially. For example, *Medicine* grew from 2864 subscriptions in 1959 to 5444 in 1969, and *Gastroenterology* grew from 4132 to 7006 in that period (Def. Ex. 102, Tr. 1042). During the period 1967 through 1968, the journal *Gastroenterology* experienced economic losses, but petitioner did not believe that photocopying was a contributing factor (Tr. 97).

In addition, petitioner's business grew at a rate faster than that of the gross national product, or of manpower working in the field of science (Pet. App. 20–21). Petitioner's net sales increased at an average rate of 14 percent between 1959 and 1969; the gross national product increased at a rate of about 9 percent and scientific manpower increased at a rate of about 4 percent (Def. Ex. 103, Tr. 1042). Medical manpower increased

Petitioner contends that photocopying damages it economically by reducing the demand for subscriptions, reprints, and back volumes, and by reducing royalties from photocopying it licenses (Pet. Br. 33–34).[46]

These contentions relate to photocopying in general, not to the restricted NIH and NLM programs, which involve primarily older rather than current issues, and which minimize the impact of photocopying on publishers such as petitioner by copying only one article per request, and by not honoring requests for substantial portions of any single issue or volume. This copying thus is not a substitute for subscription by the researcher to those journals of professional importance to him; the copying cannot be used to supply a current overview of developments in the field. At most, it relieves him of the necessity of maintaining complete files of all the magazines to which he subscribes in order to be sure of having the precise article he may eventually need.[47]

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at a slower rate. For the years 1963 through 1970, the yearly rate of growth in the number of physicians has ranged from 2.5 percent to 2.9 percent. *A Report on Physician Manpower and Medical Education*, American Medical Association, Chicago, Ill., June, 1971.

[46] Petitioner also alleges that photocopying may inhibit the development of new journals (Pet. Br. 33–34). This contention is speculative. Even if true, the market for the journals copied would hardly be adversely affected by inhibiting the development of competing journals.

[47] NLM, by making available articles from journals more than five years old, permits its member libraries to discard out-of-date journals. The space thus saved may enable the library to subscribe to a larger number of journals

The photocopying here is thus part of the essential library function of making available to library users a greater volume of material than they could conceivably purchase and retain by themselves, rather than an invasion of the journal publisher's function of providing a compilation of articles of current interest to a specialized audience.[48] These functions supplement each other; they do not conflict.[49]

In sum, the photocopies do not substitute for a purchased original; they substitute instead for a library loan. Petitioner cannot legitimately complain that the availability of library collections adversely affects its subscription market.

Nor do photocopies supplied by NIH and NLM substantially affect petitioner's market by replacing

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[48] This audience is fully supporting the specialized journal publishers, despite the availability of photocopying. The researchers who requested the articles involved here testified that they personally subscribed to between 4 and 10 journals (Tr. 526, 540, 557, 571).

[49] There is no indication that these libraries would purchase more duplicate subscriptions if they did not supply photocopies. The Court of Claims noted that the duplication rate on requests is generally low (Pet. App. 15, n. 14). Thus, presumably the volumes now owned by the libraries could satisfy the requests if they were circulated. The disadvantages of such circulation (*e.g.*, risk of loss or deterioration of virtually irreplaceable parts of a set, inconvenience of handling the entire volume when only one article is needed, and delays in filling requests, see American Library Association Brief, pp. 6–7), would not be overcome by stocking more copies, even assuming the space for them were available.

Moreover, there is no indication that photocopying has led either library to reduce the number of its subscriptions; NIH subscription costs have more than doubled in six years, n. 8, *supra*. This case is thus significantly different from a library consortium designed to share single subscriptions to various journals. See Petitioner's Brief, p. 19.

sales of reprints. Petitioner regularly sells reprints to the authors when an article is published. Such sales have not been affected by photocopying; instead they have remained essentially constant at least since 1963 (Pet. App. 78).

Moreover, neither petitioner nor the authors apparently consider the distribution of reprints to be a significant source of income. Petitioner does not maintain a stock of reprints of previously published articles, and requests for reprints of such articles are referred initially to the author, who generally distributes them free on request until his supply is exhausted (Pet. App. 78).[50] Thus, the availability of photocopies of specific articles from respondent's libraries relieves the author of a burden and invades no market petitioner seeks to exploit.[51]

Petitioner also asserts that the photocopying deprives it of royalties from the sale of photocopies by its licensees. Again, petitioner's actions have shown that it does not consider this a significant source of income, since requests for reprints are referred to licensees only if reprints or back issues are unavailable elsewhere (Pet. App. 78).[52] In any event, the fact that petitioner has negotiated a licensing agree-

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[50] The record shows that "[t]he supply of reprints and back issues is wholly inadequate" (Pet. App. 19).

[51] Since the libraries supply single articles only, it is highly unlikely that they could supplant any sales of back volumes, containing approximately 50 articles. See n. 40, *supra*. In any event, petitioner evidently does not stock back volumes (Pet. App. 19, 78).

[52] Moreover, petitioner prefers "automatic blanket licensing" to a royalty system (Pet. 37).

ment with respect to some photocopying does not indicate that no other photocopying can be a fair use. Instead, as the Court of Claims emphasized, each program must be analyzed in light of its own particular facts. On the basis of that analysis, the court properly found that the NIH and NLM programs constituted a fair use of petitioner's journals.[53]

[53] This conclusion is consistent with the most recent proposed revision of the Copyright Act, S. 1361, passed by the Senate on September 9, 1974 (120 Cong. Rec. (daily ed.) S16167). Section 107, on fair use, is designed to reflect existing doctrine; it explicitly permits the reproduction of copies for research (S. Rep. No. 983, 93d Cong., 2d Sess., 115, 120–123). Section 108 deals with library photocopying, and, since it specifically authorizes several purposes which are clearly fair uses under current law, it seems designed to reflect, rather than change, the current state of the law.

Proposed Section 108(a) provides that it is not an infringement of copyright for a library to reproduce single copies of copyrighted material under certain conditions, which include the following: that the copy be made without any purpose of commercial gain; that the library collection be open to the public or to all researchers in the field; and that the reproduction or distribution of the work contain a notice of copyright. Subsection (d) authorizes libraries to reproduce and distribute a copy of a single article from a periodical for a user or for interlibrary loan, if the copy becomes the property of the user, the reproducing library has no notice that the copy will be used for a purpose other than study or research, and copyright notices are displayed.

Systematic copying of single articles is prohibited by subsection (g); this provision, as interpreted by the Senate Report accompanying the bill (S. Rep. No. 983, 93d Cong., 2d Sess., 120–123), would not prohibit the photocopying currently practiced by NIH and NLM.

The Senate Report makes clear that the evil being guarded against by prohibiting the systematic photocopying of journal articles by libraries is reduction of the market for the copyrighted work. Thus, the Report explains that "[s]ystematic reproduction or distribution occurs when a library makes copies

In applying the doctrine of fair use, the ultimate question is whether the social policy underlying the Copyright Act—the promotion of science and the useful arts—will be served by permitting the challenged use. We submit that the library photocopying at issue

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of such materials available to other libraries or to groups of users under formal or informal arrangements whose purpose or effect is to have the reproducing library serve as their source of such material. Such systematic reproduction and distribution, as distinguished from isolated and unrelated reproduction or distribution, may substitute the copies reproduced by the source library for subscriptions or reprints or other copies which the receiving libraries or users might otherwise have purchased for themselves * * *" (S. Rep. No. 983, *supra*, at p. 122). Three examples of systematic copying are given. Two are plainly inapplicable: a library with a collection of journals in a field informs other libraries that henceforth it will make copies available, so that other libraries need not subscribe; several branches of a library system agree that different branches will subscribe to different journals and make photocopies available to each other.

Also an example of "systematic" copying is the following: "A research center employing a number of scientists and technicians subscribes to one or two copies of needed periodicals. By reproducing photocopies of articles the center is able to make the material in these periodicals available to its staff in the same manner which otherwise would have required multiple subscriptions" (S. Rep. No. 983, *supra* at p. 122).

As the record in this case indicates, the practices of NIH would not constitute "systematic" copying within the meaning of the above example. NIH does not copy articles to serve as a substitute for subscriptions by doctors employed there. To the contrary, the record indicates that extensive copying from a given issue is prohibited, and that the articles copied averaged three years in age (p. 6 and fn. 41, *supra*). The photocopying practices of NIH do not reduce the number of copies of petitioner's journals the libraries would purchase, and therefore do not constitute "systematic" copying which the new statute would prohibit.

here is a vitally important means of implementing that policy. This view is shared not only by the libraries involved, but also by those primarily responsible for fostering scientific progress—the scientists who write and use the articles.[54] Thus, the court below correctly concluded that "medicine and medical research will be injured by holding these particular practices to be an infringement" (Pet. App. 14). In reaching a result that will avoid such injury, it correctly found the doctrine of fair use applicable.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Claims should be affirmed.[55]

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
CARLA A. HILLS,
Assistant Attorney General.
HARRIET S. SHAPIRO,
Assistant to the Solicitor General.
WILLIAM G. KANTER,
MICHAEL H. STEIN,
THOMAS J. BYRNES,
Attorneys.

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[54] They have indicated, both by individual testimony and through at least one scientific organization, that they believe a finding that the NIH and NLM photocopying at issue here infringed petitioner's copyright would hamper scientific research. See pp. 24–25, *supra*.

[55] If the Court should hold that the NIH and NLM photocopying practices are not a fair use, the case should be remanded to the Court of Claims for a determination of the ownership of the articles involved. See note 21, *supra*, p. 12.

U.S. GOVERNMENT PRINTING OFFICE: 1974